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March 6, 1985

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Lisa Tiegel, Esq.
Minnesota Pollution Control Agency
1935 West County Road B2
Roseville, Minnesota 55113

BY MESSENGER

Re: United States of America, et al. vs.
Reilly Tar & Chemical Corporation, et al.

Dear Lisa:

Enclosed and served upon you by messenger please find the Memorandum of Reilly Tar & Chemical Corporation in Opposition to the State of Minnesota's Motion for Leave to File Second Amended Complaint.

I would like to thank you for the professional courtesy of allowing Reilly an extra day to prepare the brief due to the snow storm.

Very truly yours,

Renee Pritzker

RBP:ps

Enclosure

cc: ✓ The Honorable Crane Winton
All Counsel of Record (enc.)
Paul Zerby, Esq. (enc.)
Robert Leininger, Esq. (enc.)

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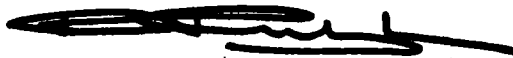
Re: United States of America, et al. vs.
Reilly Tar & Chemical Corporation, et al.
Civil File No. 4-80-469

Dear Judge Winton:

Enclosed and lodged with the Court please find the Memorandum of Reilly Tar & Chemical Corporation in Opposition to the State of Minnesota's Motion for Leave to File Second Amended Complaint.

Reilly respectfully requests that you suggest a time to the parties for oral argument on this motion.

Very truly yours,



Renee Pritzker

RBP:ps

Enclosure

cc: ✓ All Counsel of Record
Paul Zerby, Esq.
Robert Leininger, Esq.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

UNITED STATES OF AMERICA,

Civil No. 4-80-469

Plaintiff,

and

STATE OF MINNESOTA, by its
Attorney General Hubert H.
Humphrey III, its Department
of Health, and its Pollution
Control Agency,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION;
HOUSING AND REDEVELOPMENT AUTHORITY
OF ST. LOUIS PARK; OAK PARK VILLAGE
ASSOCIATES; RUSTIC OAKS CONDOMINIUM,
INC.; and PHILLIP'S INVESTMENT CO.,

Defendants,

and

CITY OF ST. LOUIS PARK,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION,

Defendant,

and

CITY OF HOPKINS,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION,

Defendant.

MEMORANDUM OF REILLY TAR &
CHEMICAL CORPORATION IN
OPPOSITION TO THE STATE
OF MINNESOTA'S MOTION
FOR LEAVE TO FILE
SECOND AMENDED
COMPLAINT

INTRODUCTION

By motion dated January 24, 1985, the State of Minnesota (the "State") seeks leave under Rule 15(a) of the Federal Rules of Civil Procedure to amend its complaint to add claims for relief under the Environmental Response and Liability Act ("MERLA"), Minn. Stat. Ch. 115B.

We remind the Court that the State is an intervenor in this action. In September 1980, the United States commenced an action against Reilly Tar & Chemical Corporation ("Reilly") under the provisions of the Resource Conservation and Recovery Act ("RCRA") to remedy alleged contamination at the former Reilly site in St. Louis Park. At the time the federal action was filed, the State filed a motion to intervene asserting claims under the citizen suit provisions of RCRA as well as various State law claims. In September of 1981, the State served an amended complaint, adding a claim under the recently enacted Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").

The State's present motion to amend its complaint to add the MERLA count comes nearly one and a half years after the effective date of that statute, July 1, 1983.

Although the State in their brief characterizes MERLA as "the State's most important tool for remedying contamination resulting from releases or threatened releases of hazardous substances," the State does not offer any reason for such a lengthy delay in moving to amend its complaint to add the MERLA

claims. Reilly suggests that the only reason the amendment is being made at this time is in a vain attempt to bootstrap the State's claims for attorneys' fees. It was not until Reilly made the observation in its settlement offers that the State was on even shakier ground than the United States regarding any right to attorneys' fees that the State embraced the idea of bringing this motion to amend (see June 21, 1984 letter from B. A. Comstock to D. Hird, S. Shakman and W. Popham and September 17, 1984 letter from E. J. Schwartzbauer to Judge Magnuson, attached as Exhibits 1 and 2, respectively).

If the State's arguments are accurate, namely that the MERLA claims are merely cumulative, providing nothing more than recovery available under statutes which have already been pleaded, the State will suffer no prejudice by a denial of their motion to amend, and the interests of justice will be served in that merely cumulative pleadings will not have been added to an already lengthy set. And, as set out below, there are substantial reasons of undue prejudice and attempted improper coercion which require denial of this motion to amend on the virtual eve of trial.

I. THE STATE OF MINNESOTA UNDULY DELAYED
THE AMENDMENT OF ITS COMPLAINT, ADDING
THE MERLA COUNT

Although the policy of amendment of pleadings under Rule 15 is liberal, that policy does not mean the absence of all restraint. If such a result had been intended, leave of court would not be required. "The requirement of judicial

approval suggests that there are instances where leave should not be granted." Klee v. Pittsburgh & West Virginia Railway Co., 22 FRD 252, 255 (W.D. Pa. 1958).

Among the factors which may justify denial of leave to amend are undue delay, dilatory motive by the movant or bad faith, or undue prejudice to the opposing party. Foman v. Davis, 371 U.S. 178 (1962); Tiernan v. Blyth, Eastman, Dillon & Co., 719 F.2d 1, 4 (1st Cir. 1983); Brown-Marx Associates, Ltd. v. Emigrant Sav. Bank, 703 F.2d 1361, 1371 (11th Cir. 1983); Daves v. Payless Cashways, Inc., 661 F.2d 1022, 1024 (5th Cir. 1981).

The State has unduly delayed the amendment of their complaint in this case. Although the MERLA statute was passed by the Minnesota Legislature in May of 1983, and became effective in July of 1983, the State delayed nearly a year and a half before taking steps to amend their complaint, doing so only after a Case Management Order had been entered, substantial aspects of discovery had been closed, and a trial date had been fixed that is now rapidly approaching and is but weeks away. There are no newly discovered facts which would have justified the delay, nor was the State unaware of the potential cause of action when the right to assert the claim actually accrued.

Undue delay in filing a motion to amend is a rational basis for denying the motion. Midwest Milk Monopolization Litigation v. Associated Milk Producers, Inc., 730 F.2d 528, 532

(8th Cir. 1984), cert. denied, Illinois v. Assoc. Milk Producers, Inc., ___ U.S. ___, 105 S. Ct. 306 (1984). And it is clear that lack of diligence is a reason for refusing to permit amendment. King & King Enterprises v. Champlin Petroleum, 446 F. Supp. 906, 914 (E.D. Okla. 1978); Freeman v. Continental Gin Company, 381 F.2d 459, 469 (5th Cir. 1967). Where there is such a lack of diligence, the burden is on the party seeking to amend to show that the delay was due to oversight, inadvertence or excusable neglect. King & King Enterprises v. Champlin Petroleum, 446 F. Supp. at 914; Freeman v. Continental Gin Company, 381 F.2d at 469.

In the present case, the State has failed to offer any justification which would excuse its delay; therefore, there is adequate basis to deny the amendment on that ground alone.

II. THE ABSENCE OF PREJUDICE TO THE STATE
IF THE AMENDMENT IS DENIED MITIGATES
AGAINST ALLOWING AMENDMENT OF THE COM-
PLAINT, AND PREJUDICE TO REILLY REQUIRES
ITS DENIAL

An additional factor which is proper for the Court to consider in ruling on a motion to amend is whether undue prejudice to the movant will result from denial of leave to amend. Chitimacha Tribe of Louisiana v. Harry L. Laws Co., 690 F.2d 1157, 1164 (5th Cir. 1982), cert. denied, ___ U.S. ___, 104 S. Ct. 69 (1983); Bamm, Inc. v. GAF Corporation, 651 F.2d 389, 391 (5th Cir. 1981); L. D. Schreiber Cheese Co., Inc. v. Clearfield Cheese Co., Inc., 495 F. Supp. 313, 316 (W.D. Pa. 1980).

Since the State alleges that the amendment would only provide an added basis for claims of liability against Reilly (Mem. of State at 2), rather than presenting a new and independent theory of relief, it is in no practical way prejudiced by denial of leave to amend. If the State's position is accurate, the MERLA claims are merely cumulative and the State will be able to recover the same relief under other statutes and causes of action which have already been plead. On that basis alone, there would be no necessity in allowing the amendment since it would add nothing to the State's claims as plead.

Indeed, MERLA itself precludes any double recovery, a matter which the State fails to call to the Court's attention. MERLA forbids double recovery for the cost of remedying contamination. Minn. Stat. § 115B.13 provides:

A person who recovers response costs or damages pursuant to sections 115B.01 to 115B.15 may not recover the same costs or damages pursuant to any other law. A person who recovers response costs or damages pursuant to any other state or federal law may not recover for the same costs or damages pursuant to sections 115B.01 to 115B.15.

MERLA's own prohibition against "double counting" also highlights the weakness inherent in the State's argument that, at the least, MERLA adds to the State's basis for an attempt to recover attorneys' fees costs. If the State is sincere in its representations to this Court that liability under MERLA is identical to that under CERCLA, and that the relief available and requested is also identical, then MERLA adds absolutely nothing to the State's case against Reilly, and all of

the work, including attorneys' fees, done in the case from here on out would be the same, whether or not MERLA is added. None of it could be independently attributed to the presence of a MERLA claim, and MERLA itself prohibits any double recovery of a remedy. Accordingly, no legitimate claim for fees expended under or based on MERLA could properly be made out. This Court is not required to allow a party to add vain counts to already complex litigation on the virtual eve of trial.

Alternatively, if MERLA liability and awardable relief are not, as the State represents, identical to CERCLA, then it is extremely prejudicial to Reilly to attempt to add either a different basis of liability or a different standard of relief at this late point in the litigation. The State cannot have it both ways on this point as far as prejudice to Reilly is concerned, and there are at least substantial reasons to doubt the sincerity of the State's representations regarding the identity of MERLA and CERCLA liability and relief. The State, for example, does not point out that the standard for evaluating the appropriateness of response actions is phrased differently under CERCLA and MERLA. CERCLA requires that response actions have consistency with the National Contingency Plan (NCP). 42 U.S.C. § 9607(a)(4)(A). Under the NCP, specific factors must be considered in determining the appropriate response action to be taken. For remedial actions providing a permanent solution to a release, the NCP requires, among other things, that the selected alternative be the lowest cost alternative

which is "technologically feasible and reliable and which effectively mitigates and minimizes damage to and provides adequate protection of public health, welfare, or the environment."

40 C.F.R. § 300.69(j). However, there is no requirement apparent in the language of MERLA that the State, under MERLA, has to meet the NCP thresholds for a remedial plan. Rather, the MERLA standard which the State must meet is that the response or removal costs must be "reasonable and necessary." Minn. Stat. § 115B.04, subd. 1.

Now it may be that the two standards are identical, and that the State will be willing to be so bound. The standard for remedial actions, however, at least linguistically, appears to be different under the two statutes. Yet, since all the relevant time limitations on discovery under the Case Management Order had run by the time the State brought its motion to amend, Reilly has been denied any meaningful discovery on exploring the differences, both legal and factual, between these two standards. The deadline for interrogatories, requests for production and requests for admissions have passed. Many, if not most, of the depositions relative to Phase I in this action have been taken. Had the MERLA claims been added to the action earlier, Reilly would have explored through discovery the differences between the MERLA claims and the CERCLA and RCRA claims and, if needed, adjusted its trial and defense strategy accordingly. With the passage of many discovery deadlines and with

deposition discovery concluding in less than a month, Reilly will suffer great prejudice in having to attempt to prepare for trial now without a full opportunity to explore the apparent differences.

III. THAT ISSUANCE NOW OF THE RFRA, ON WHICH THE MERLA AMENDMENT IS PREMISED, IS AN ATTEMPT TO COERCE REILLY INTO GIVING UP ITS DUE PROCESS TRIAL RIGHTS IS AN ADDITIONAL REASON TO DENY THE AMENDMENT

There is, moreover, a very real aspect of an attempt at improper coercion in all this. Despite its admitted ability to do so much earlier, the State chose not to have the MPCA Board issue a RFRA to Reilly, the preliminary step to assertion of a MERLA claim (as the State indicates at p. 8 of their brief) until the late fall of 1984, after the parties were aware that the Court had decided to bifurcate the trial into Phase I and Phase II and was planning on a spring, 1985 trial date of Phase I. The RFRA order issued against Reilly in December 1984 carries with it ruinous penalties for non-compliance: fines totalling up to \$20,000 per day may be imposed. Minn. Stat. § 115B.18, Subd. 1. The RFRA issued to Reilly is, moreover, nothing more than an attempt by the State, through the in terrorem effect of the \$20,000 per day penalties, to coerce Reilly into accepting the State's remedial wish list and giving up its due process right to defend itself in the court action currently pending without the chilling effect of ruinous penalties. That court action has begun by the federal and state governments years ago and seeks the same relief that the RFRA

would now impose by administrative fiat. Indeed, the RFRA adds nothing to the remedy which is about to be judicially determined, except the coercive effect of the ruinous penalties if Reilly is so bold as to fail to comply with the order and insist on defending itself against the remedy sought in the judicial arena where the state and federal governments began the action in the first place.^{1/} Reilly has thus far avoided incurrence of the penalties by remaining in technical and good faith compliance with the RFRA. Reilly has done so, however, only under vehement protest, and regards in terrorem use of the RFRA and its penalties as an unconstitutional attempt to coerce it into giving up its due process right fully to defend itself in the state and federal governments' lawsuit. Indeed, at a hearing on March 5, 1985, Judge Magnuson granted Reilly a temporary restraining order, enjoining even the possible accrual of any penalties under the RFRA at least until he has ruled on a motion for a preliminary injunction seeking the same relief from penalty accrual. A hearing on that matter has been set for March 15, 1985. Addition now of a MERLA claim to the pending lawsuit is but part and parcel of that same coercive strategy, in that it flows from the issuance of the RFRA and is but an attempt to legitimize its issuance and its attempted

^{1/} Reilly points out to the Court that the State can continue to proceed administratively with such actions as it deems necessary without adding a MERLA claim to this pending litigation. Minn. Stat. § 115B.17, Subd. 1(a)(1) and 115B.18, Subd. 3 (1984). Institution of a civil action under MERLA is not a condition precedent to administrative action under a RFRA.

coercion on the virtual eve of trial. Reilly submits that this use of the MERLA RFRA in the context of this case is yet another reason to deny the motion to amend to add a MERLA claim.

CONCLUSION

Due to the undue delay of the State in bringing its motion to amend, the lack of prejudice to the State if the motion is denied, and the prejudice to Reilly if the motion is granted, the motion of the State of Minnesota to amend its Complaint to include counts under MERLA should be denied.

Dated: March 5, 1985

Respectfully submitted,

DORSEY & WHITNEY

By 

Edward J. Schwartzbauer

Becky A. Comstock

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Attorneys for Defendant
Reilly Tar & Chemical
Corporation

June 21, 1984

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4344 IDS Center
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Minneapolis, Minnesota 55402

Re: U.S.A., et al. v. Reilly Tar &
Chemical Corporation, et al.

Gentlemen:

With this letter you will find a copy of a settlement package hereby presented by Reilly Tar & Chemical Corporation to the United States, the State of Minnesota and the City of St. Louis Park with copies to all other parties in the above-captioned matter. We have also enclosed a courtesy copy of the settlement package for each party's client.

The settlement package includes a proposed Consent Decree, a proposed Remedial Action Plan (RAP) and a comparative index of the federal and state RAP with Reilly's RAP. This settlement package is presented in response to a request of the State of Minnesota that Reilly submit this to the parties. It

David Hird, Esq.
Stephen Shakman, Esq.
Wayne G. Popham, Esq.

June 21, 1984
Page Two

has additionally taken into consideration points identified in Sandra Gardebring's letter to Thomas E. Reilly, Jr., dated May 10, 1984, David Hird's letter to me of May 31, 1984 and Steve Shakman's letter to me of June 7, 1984. This settlement package is Reilly's sincere response to the issues raised in those letters and is presented with the belief that a settlement can be accomplished in this matter among all of the parties. It is the outgrowth of a series of settlement discussions which commenced in September, 1980, as set forth in the enclosed chronology.

We invite your careful review of the provisions of the enclosed RAP. We believe that such a review would disclose that the funding by Reilly for immediate capital expenditures, plus the provisions for short-term and long-term contingencies, together with the City's commitment to the implementation of remedial measures, constitutes substantial compliance with every aspect of the plaintiff's remedial action plan as presented to Reilly in January, 1984. The enclosed comparative index identifying each of the elements in the federal and state RAP and the comparable elements in the Reilly RAP is intended to help all of the parties to understand this important point.

You should notice especially paragraphs 8.2.4 and 10.2.1 of the enclosed RAP because these paragraphs constitute further substantive refinement of Reilly's position. Paragraphs 10.2.1 and 13.6 deal with the gradient control system for the shallow (Drift-Platteville) aquifer and provide for a gradient control well system that will control the movement of contaminants in those aquifers in areas where total PAH or phenolics concentrations exceed 10 micrograms per liter. Paragraphs 8.2.4 and 13.4 provide for the installation of an additional gradient control well for the Prairie du Chien aquifer to be located near well 70 (old St. Louis Park Theater well) if that appears necessary based upon data to be accumulated within the next five years.

Notice also Section G of the Consent Decree wherein Reilly proposes to share the risk of excess costs to construct the granular activation carbon (GAC) treatment system with the City of St. Louis Park.

Reilly has also revised the "release" language in the consent decree in order to accommodate the settlement policies

David Hird, Esq.
Stephen Shakman, Esq.
Wayne G. Popham, Esq.

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Page Three

of the United States and the State of Minnesota. The language in the current version is taken from the Consent Judgment in the matter of the Hyde Park Landfill and Bloody Run drainage area, United States v. Hooker Chemicals & Plastics Corp., et al., Civil Action No. 79-989, January 19, 1981. It also follows the language used in the Consent Judgment in the matter of the S-Area Site, United States v. Hooker, December 9, 1983. In a sense, this language constitutes a "fresh approach" to the previously polarized views of Reilly and the State of Minnesota, but is not at all novel from the United States' standpoint, since the language has been used by the United States in other cases.

In addition, this case is one in which the parties have expressly negotiated with respect to contingencies identified in the ERT report as well as in those negotiations. As a part of the settlement, Reilly will be delivering securities, the face value of which we believe to be satisfactory to the City, which under the Consent Decree will be committed to implement all contingencies when and if they become necessary. In view of that, we believe that Reilly is entitled to a form of release which eliminates any further exposure with respect to contingencies contemplated by the parties.

In a meeting between Eldon Kaul and Ed Schwartzbauer held on April 17, 1984, and in a meeting between Steve Shakman, Mike Hansel, Schwartzbauer and the undersigned on April 27, 1984, Ed indicated that Reilly would review once again its proposal with respect to reimbursement of the plaintiffs' past costs. We have made such a review, which has included extensive legal research and many discussions between this office and its client. Both Reilly and this office believe that the enclosed revised proposals constitute a good faith, fair proposal, consistent with nationally announced federal settlement guidelines for CERCLA cases. Specifically, Reilly is offering to the United States not only substantial compliance with the remedial aspects of the settlement at no cost to the United States, but also reimbursement of "Superfund" expenditures and a substantial portion of other site-related expenditures. If this proposal is not consistent with federal settlement policies, Reilly would be pleased to meet with representatives of the Federal government to explore the question of any shortfall between this proposal and such policies.

David Hird, Esq.
Stephen Shakman, Esq.
Wayne G. Popham, Esq.

June 21, 1984
Page Four

We believe that the State's claim for past costs (especially those incurred in the 1970's) stand on a very different legal basis from the restitution claims made by the United States under CERCLA. Accordingly, the State claim must, we believe, be separately evaluated in light of the common law and Minnesota Statutes. In addition, our view is that most of the State's costs are not only not reimbursable under controlling law but, in our view, were neither cost-effective nor reasonable. We would be willing to meet with representatives of the State of Minnesota to further discuss our offer to it in the amount of \$420,000 for past costs. However, it should be understood that the major concern of Reilly management in evaluating settlement possibilities is overall fairness. Accordingly, Reilly will not pay claims which have no valid basis in law or fact merely because of the threat of continued litigation expense.

This proposal, as indicated, appears to us to constitute substantial compliance with the United States remedial requests and our understanding of federal settlement guidelines. Moreover, the expressed willingness of the City of St. Louis Park to implement the Consent Decree with Reilly's financial support as described in the enclosed documents, would resolve all issues between Reilly and the City, if the claims of the United States and the State can be resolved on the basis proposed herein. In view of this, we believe that a prompt meeting between one or two persons representing Reilly, one or two persons representing the United States, one or two persons representing the State, and one or two persons representing the City should now be held in order to determine whether or not this case can be settled.

Reilly would like to resolve all disputes between all parties, if possible. However, if the parties are in substantial agreement on the remedy for the St. Louis Park water problem, but remain in disagreement concerning the claims for reimbursement of past costs, we suggest that we explore a settlement format which provides for the prompt implementation of the remedy and an agreement to arbitrate or litigate the claims for past costs.

The enclosed chronology may remind you that settlement discussions were commenced in this matter within one month

David Hird, Esq.
Stephen Shakman, Esq.
Wayne G. Popham, Esq.

June 21, 1984

Page Five

from commencement of the federal action. It may also remind you that from the beginning, Reilly and its consultants have urged all plaintiffs to concentrate first on (1) establishing a criteria for drinking water quality, and (2) exploring the feasibility of drinking water treatment, with the forecast that if those two items were established, the additional remedial measures, such as limited gradient control well systems, would fall into place, if the remedy was not assumed in advance of the studies. We believe that this prediction has proved to be accurate and that the enclosed RAP, which contains the input of all parties, reflects that approach. We believe that all parties and their consultants can be proud of the contributions that all have made to this remedial plan. We hope that it can now be implemented and that the largely historical differences between Reilly and the State of Minnesota can now be put aside.

I will call Mr. Hird, Mr. Shakman and Mr. Popham within one week to arrange a meeting to discuss issues which affect their clients. In the meantime, your thoughtful attention to the matters raised in this settlement package will be greatly appreciated.

Very truly yours,

Becky A. Comstock

BAC:ml
Enclosures

cc: All Counsel of Record (w/enclosures)
Robert Leininger, Esq.
Paul G. Zerby, Esq.

September 17, 1984

Honorable Paul A. Magnuson
United States District Court Judge
708 Federal Courts Building
St. Paul, Minnesota 55101

RE: USA and State of Minnesota, et al. vs.
Reilly Tar & Chemical Corporation, et al.
Civ. No. 4-80-469

Dear Judge Magnuson:

This letter is submitted in order to assist the Court in dealing with the matters to be considered at the pre-trial conference scheduled for September 19, 1984 at 8:30 a.m. Each of the topics which follow are those set forth in the Court's Notice of Pre-Trial Conference dated August 24, 1984. This notice was most welcome, since this case has progressed to the point where consultation between the Court and all parties seems appropriate.

SETTLEMENT

Contrary to the statement made in the Record of Decision signed by the EPA's Lee Thomas on June 7, 1984 and forwarded to the Court by Mr. Hird with his letter of June 11, settlement discussions did not end in February 1984, and the stalemate which seemed to exist was not principally because of disagreements over the remedy. Rather, the plaintiffs took the position that they would not continue discussions on remedy unless Reilly agreed to pay substantially all of the plaintiffs' claims for administrative costs and attorneys fees.

I am enclosing for the Court a copy of Ms. Comstock's letter of June 21, 1984 and an attached settlement chronology. In reply to Ms. Comstock's letter, Mr. Hird wrote the enclosed

EXHIBIT 2

September 17, 1984

letter of July 17, 1984, promising to submit a counter-offer in the form of a revised consent decree. As of the date that this letter is written, we have not yet received that counter-proposal, although in recent meetings, Mr. Hird has indicated that we should expect to receive one on or about the date of the pre-trial conference.

As you will see from Ms. Comstock's letter and the chronology, the State of Minnesota is demanding reimbursement for its internal administrative expenses and attorneys fees dating back to 1970 in the total amount of 2.75 million dollars. We believe there is no authority under CERCLA for such a claim. Rather, this claim is based upon the State's reading of Minn. Stat. § 115.071 which was not enacted until 1973, after Reilly ceased its operations and which provides for litigation expenses, not attorneys fees. This position is taken in spite of the strong legislative presumption in Minnesota against the retroactive application of legislation. See Minn. Stat. § 645.21; Cooper v. Watson, 290 Minn. 362, 187, N.W.2d 689, 693 (1971); Ekstrom v. Harmon, 256 Minn. 166, 98 N.W.2d 241, 242 (1959); Chapman v. Davis, 233 Minn. 62, 45 N.W.2d 822, 824 (1951); George Benz Sons, Inc. v. Schenley Distillers Corp., 227 Minn. 249, 35 N.W.2d 436, 439 (1948). As you will see from Ms. Comstock's letter, at that time, Reilly suggested that the parties do not appear to be far apart on the remedial aspects of a settlement but may be very far apart on payment of compensation to the State for its past costs; that if that is the case, Reilly would be willing to enter into a partial settlement relating only to the remedy, with the understanding that the State's past cost claims would then be separately litigated or arbitrated. This is the status of settlement negotiations as we approach the scheduled pre-trial.

Estimated Trial Days

It is difficult to estimate the length of the trial. However, if the case were bifurcated so that we would try the RCRA/CERCLA* issues first, I estimate that the defendant's case could be put in in four weeks. My guess is that the

* By this we mean a trial in which the United States and other CERCLA claimants (the State and the City), and Reilly present evidence concerning the remedy, if any, which is proper under RCRA/CERCLA and the constitutionality thereof. Past cost claims by the State and the City would be regarded as "Intervenor" issues.

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plaintiffs' cases would be equivalent and that the total trial could be completed in eight weeks. This includes the constitutional issues.

If, however, the Court does not bifurcate and the issues between Reilly and the intervenors are also tried, the case becomes about three times as complicated and would take about three times as long to try. This is because of (1) the substantial "past cost" claims of the City and State, (2) Reilly's defense of laches with respect to the State, (3) Reilly's defense of settlement with respect to the City and State, (4) the City's suit for a declaratory judgment with respect to the hold harmless agreement, and (5) because the State's mishandling of the problem has exacerbated it. The wells in Hopkins would not have become contaminated, for example, if the State had diligently pursued remedies which were available in 1974. Basically, we will need to examine carefully the circumstances surrounding the 1970 lawsuit and the State's handling of the situation post-1984. There have been fifty-five consultants' reports prepared on the Reilly site over the years and nothing concrete done about the remedy, though the remedies were sometimes obvious and at least were determinable. Thus, my estimate of the length of trial grows to twenty-four weeks.

Bifurcation

I have previously said that I believed that the RCRA/CERCLA issues are inextricably intertwined with the issues as between Reilly and the intervenors. They are. But sometimes a pragmatic regard for the judicial system overcomes a purely legal analysis. It has become increasingly obvious that the determination of issues between Reilly and the intervenors is much more time-consuming than the issues between Reilly and the United States. In fact, none of Reilly's discovery to date has gone to the United States' claims. All of Reilly's discovery has been directed to the City and State claims. A series of depositions which Reilly embarked upon on September 10, scheduled to consume most of the days between that date and November 1, will in large measure continue to be directed toward the intervenors' claims. No one has yet had an opportunity to depose the experts on the question of the remedy, if any, which is reasonable and appropriate under RCRA/CERCLA.

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Accordingly, it has now become very obvious to us that this case should be scheduled for trial of the RCRA/CERCLA issues, after a definite, stipulated period for completion of discovery on those issues, with the remaining discovery concerning issues raised by the intervenors' cases deferred until later. This would be much less expensive for the parties to this case who worry about such things as expense. I would guess that some of the parties, possibly even the City of St. Louis Park, might not take an active role in litigation of the remedial issues. Moreover, findings in Reilly's favor on the RCRA/CERCLA issues wherein the standard is strict liability should dispose of the claims of the intervenors where the standard is something other than strict liability. Findings in favor of the governmental plaintiffs would not necessarily dispose of the claims of the intervenors, but my experience tells me that it would be more likely that the case would be settled on the remaining issues.

It also seems to us that the order of the Court bifurcating the issues should provide that there will be no more motions on dispositive issues until after discovery has been completed. This has been an unusual case. We have all devoted many, many months of lawyer time briefing legal issues on substantive matters. I include Reilly's initial motion to dismiss and do not intend to blame the plaintiffs for this. But the burden placed on us because of the unusual amount of legal research and briefing has made it difficult to get this case ready for trial. There are presently six Dorsey & Whitney lawyers and several paralegals working on this case. Their contributions will still be needed if we decide to focus on the RCRA/CERCLA issues. But if we are going to be diverted from our major task by motions that are not absolutely necessary for the completion of discovery on CERCLA issues, we will not be able to get ready in a timely manner.

There is ample precedent among the federal Courts for bifurcating the issues. See, for example, United States v. Seymour Recycling Corp., No. IP-80-447-6, 1984 Hazardous Waste Litigation Reporter 6080 (S.D. Ind. August 6, 1984) (bifurcate the liability and remedy issues); United States v. Conservation Chemical, No. 0983-CV-5, 1984 Hazardous Waste Litigation Reporter 6065, 6088 (W.D. Mo. July 16, 1984) (bifurcate (1) the government's request for injunctive relief, all cross-claims, counterclaims, third-party claims for inclusion in the injunctive order, and the form and scope of the appropriate remedy; and (2) all pending claims for apportion-

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ment of costs arising out of any order for injunctive relief, and the plaintiff's claim for response costs under CERCLA Sections 104 and 107(a)); and United States v. Wade, C.A. No. 79-1426, 1984 Hazardous Waste Litigation Reporter 5309, 5329 (E.D. Pa. February 21, 1984) (bifurcate liability and cost recovery). These cases do not directly support the bifurcation requested here, but they are supportive, we think, of the philosophy that it is proper to decide remedy-oriented issues prior to other issues.

If there is to be a bifurcation, we suggest that the Court also order the parties to confer to plan a schedule for discovery limited to the RCRA/CERCLA issues,* and to reach agreement, if possible, concerning the additional time which will be necessary after the completion of discovery to prepare for trial. In the absence of such a conference, we could only guess as to how much time would be needed. However, my guess is that most of that discovery would be expert witness discovery and might reasonably be completed within a few months. Thereafter, the parties need time to plan their case, review exhibits, make plans as to reading of depositions, etc., but this would, I suspect, require only a matter of a very few months before the process of exchanging stipulations of fact, trial briefs, proposed findings, etc., as recited in the pre-trial notice might begin. It might be possible to select a trial date for the RCRA/CERCLA issues now and insist that the parties get ready to meet it. After the RCRA/CERCLA trial, the Court could then take up the unresolved issues.

Discovery Matters

The first discovery deadline established by the Magistrate has come and gone. That deadline was May 1, 1984. On February 14, 1984, Reilly moved for an extension of that deadline to November 1, 1984, and all parties agreed to that extension. However, the Magistrate has not ruled on the motion, possibly because he understands from the matters that have been before him, that we cannot complete discovery by November 1. In the meantime, therefore, all parties have proceeded with discovery. Reilly hoped to complete much of the oral discovery related to damages and remedy this past

* The order might also permit depositions of persons who may be unavailable at trial, to preserve their testimony.

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summer. However, extensive demands on our time and the time of our experts, both with respect to settlement and with respect to the briefing of discovery motions which will be before you on appeal shortly, delayed our commencement of the oral discovery on the damages-remedy issues.

In general, although extensive discovery has been completed, there are still many witnesses who must be deposed. Counsel for Reilly have taken the following depositions:

NON-RESPONSIVE

The State of Minnesota has deposed the following

NON-RESPONSIVE

The United States has deposed Richard J. Hennessy, F. J. Mootz, P. C. Reilly, and Robert Polack and has redeposed Carl Leshner, Executive Vice President of Reilly. The City of St. Louis Park has deposed Chris Cherches and Susan Workman Cherches.

In addition to the 45 depositions already taken, the parties have been moving forward on an intensive deposition

* Not complete; in process this week.

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schedule in order to complete remaining depositions. As indicated in the August 15, 1984 letter and attachments from Mike Wahoske to counsel for the plaintiffs, Reilly has prepared a list of proposed additional deponents. A few of the persons listed on Attachment A have been previously deposed by Reilly; however, their depositions have not been completed. The new depositions will cover new issues.

Although the parties are still in the process of working out a deposition schedule based on witness and lawyer availability, the parties have already scheduled 13 days of depositions in September and 15 days of depositions in October. It is expected that within the next week the remaining available dates within the next month and a half will also be designated for depositions.

This deposition schedule, which includes nearly every available workday between the present time and November 1st, does not include any expert depositions. All parties desire to depose each other's experts. Counsel for Reilly would like to depose the experts listed in Appendix D of the attached August 15, 1984 letter of Mr. Wahoske as well as any additional experts which may be identified by the parties in response to discovery. The schedule also does not include the scheduling and resumption of depositions of lawyers (Messrs. Lindall, Van de North, Popham, Norden, Macomber, Kaul, Hoffer) which depend on the outcome of the Court's rulings concerning the assertion of the attorney-client privilege and work product doctrine. Magistrate Doline has recently ruled favorably to Reilly on a large portion of Reilly's motion to compel deposition testimony but all parties to the motion have appealed from his order. Additionally, depending upon the outcome of the scheduled depositions, many of the persons listed on Attachment B of Mr. Wahoske's letter may have to be deposed.

In addition to those oral depositions, there are several sets of interrogatories and requests for production served recently for which responses have not been received. And the parties have been trying to resolve among themselves disputes with respect to documentary evidence withheld on the ground that they constitute trial preparation materials.

Most, although not all, of the discovery which has not been completed relates to the claims of the intervenors.

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Clearly, it is these claims in intervention which have prevented us from getting this case ready for trial.

If the Court does not accept our suggestions as to bifurcation, then we would like the Court to become involved in the question of a timetable for completion of discovery of fact witnesses and expert witnesses. The parties have been working very hard on this case. We have not let our trial preparation lag. Our office printouts would disclose that we have been devoting about 500 hours per month to this case for a long time. As indicated, there has been an unusual amount of briefing which has hindered trial preparation. None of the parties is particularly happy with the discovery schedule for the next month and a half in that we are pressing to meet a possible deadline later this year which has been requested by the parties but which has not been ruled on by the Court.

Accordingly, if we are not going to bifurcate, we would greatly appreciate having from the Court a realistic statement as to when the Court can hear the entire twenty-four week trial, and the establishment of a realistic discovery deadline consistent with that statement.

OTHER MATTERS

1. The Need for a Special Master

There probably is no need for a special master if the case is bifurcated. However, the depositions of lawyers (which are needed in connection with the intervenors' claims) have resulted in so many objections, so much on-the-record and off-the-record discussion amongst counsel and so much delay and expense, that we have, in our letter to Magistrate Boline dated June 15, 1984 suggested the appointment of a Special Master to attend the lawyer depositions. A copy is attached.

2. The Administrative Order

An important development which could impact this case was the issuance by the EPA on August 1, 1984 of an administrative order directed to Reilly ordering it to build and operate in St. Louis Park a granular activated carbon treatment plant for the treatment of drinking water from wells

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10 and 15. This is the remedy which Mr. Hird's letter of June 11 describes as achieving the "two major remedial objections [sic objectives] of restoring drinking water and helping to control the spread of contaminants." Reilly has stated its objections to the order in writing and the parties have completed a one-day conference held at the Region V offices in Chicago on September 11, 1984. The result was our letter of September 14, 1984, copy enclosed, in which we state Reilly's intent to build the plant in accordance with a design proposed by its consultants.

The issuance of this order may impact this case. For example, assuming that the parties are able to agree on the design and other questions set forth in my September 14 letter, we expect that the plant will be built by Reilly's contractor, Calgon, before the end of the year. As Mr. Hird's letter tells us, "the installation of GAC drinking water treatment will address the most immediate problems of contamination at the site, and thus is a critical step forward in the complete remedy." Following completion of the plant facilities by Reilly, it is hard for us to imagine how the Government will try to persuade the Court that there is still an imminent and substantial endangerment under § 7003 of RCRA and section 106 of CERCLA. (It took the Government four years after the commencement of this action to decide upon a remedy for the drinking water shortage in St. Louis Park and it would have taken another year to implement had Reilly and its consultants not proposed an alternate design which could be installed much more quickly).

Perhaps the more important question is whether the Government now intends to pre-empt the Court's jurisdiction over this case by a series of administrative orders under section 106 of CERCLA. Such orders place the respondent (Reilly) in the position of either disobeying the order and running the risk of incurring penalties in the amount of \$5,000 per day while the state and federal administrative agencies try to implement a remedy, plus treble damages under CERCLA if the Court later finds disobedience to be willful, or remedying the perceived problem itself. For a variety of reasons, Reilly has offered to contract with Calgon to build the treatment plant (provided St. Louis Park agrees to operate it, since Reilly is not a Minnesota public utility and cannot sell water in St. Louis Park without qualifying as a public utility and obtaining a franchise from the City Council).

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In spite of this offer by Reilly, there remains a justiciable controversy, we believe, as to whether the plant is necessary and whether Reilly is entitled to reimbursement for the expenditure. Reilly's consultants believe that the wells in St. Louis Park were closed only because of a failure to take account of the effect of treatment facilities already in place upon so-called "carcinogenic"* PAH, plus a criteria for non-carcinogens developed by the State of Minnesota but never adopted as a regulation and used nowhere else in the world, not even by the EPA. If the EPA criteria for carcinogens were used, and if a criteria for non-carcinogens based on scientific health considerations were used, the St. Louis Park wells could be reopened without the GAC plant. Within the section 106 order, the EPA seeks to impose a criteria which could not be met by the water systems in St. Paul or Minneapolis. Given the fact that all these issues were first raised by the EPA in the context of this lawsuit and in view of the in terrorem effect of the administrative order and the penalties provided by CERCLA, it is Reilly's plan to do this work "under protest" and reserve the right to reimbursement, within the confines of the lawsuit.

If the EPA is planning to thus issue a series of orders to Reilly carrying this risk of substantial penalties, one wonders why they are placing upon this Court the additional burden of an "imminent and substantial endangerment" suit. While we do not know the answer to that question, we do know that in this instance the RCRA and CERCLA claims have provided to the Minnesota PCA and City of St. Louis Park a convenient umbrella under which to make a federal case out of their state state-law claims which were the subject of the 1970 lawsuit in Hennepin County District Court, claims which were either (1) settled or (2) barred by the statute of limitations or laches.

Therefore, if the federal remedy is implemented through administrative orders rather than through the equitable decrees of this Court, we intend to move to remand the state

* When we use this word we mean those that have been thought to be carcinogenic in laboratory mice. There is no evidence of human carcinogenicity. Many chemicals are carcinogenic in mice but not in other animals, including humans. See "Of Mice and Men" a report by the American Council of Science and Health, copy enclosed.

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law claims of the intervenors to the state court, where they belong.

Moreover, should any additional section 106 orders be issued to Reilly prior to the trial date on CERCLA issues which is set by this Court, we will seek an order from this Court staying the effective date of any order resulting from such a use of the EPA's administrative powers as an abuse of the discretion conferred by Congress. We know of no reason why the EPA cannot come into this Court in order to have the Court decide the remedy on the basis of the evidence, rather than issue its unilateral orders to accomplish that which could have been considered at the outset of and in the context of this litigation and which is squarely within the scope of the pleadings.

It is simply unfair to require Reilly to expend enormous sums on lawyers and consultants with the expectation that the remedy will be determined by this Court, and then have the EPA side-step the judicial process by these orders.

Finally, although Reilly is negotiating in good faith to reach agreement with the EPA and the plaintiffs on the terms of the August 1 order, if they cannot agree, Reilly will be forced to seek immediate judicial review in this Court of that order under § 113(b) of CERCLA and the Administrative Procedure Act which together give this Court reviewing authority. Of course, there is a similar potential for any other order that may be issued. This will impact all of the matters discussed in this letter because we will then have to determine how this Court's review of that order will be synchronized with everything else that is going on.

To summarize, the Court's control of this matter may be impacted by the Administrative Order in one of the following ways:

- (1) The construction of the GAC plant may eliminate the claim of an imminent and substantial endangerment;
- (2) If administrative orders make the remedial issues moot, the question will arise concerning remanding the intervenors' claims to the State Court where they are still pending;

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- (3) If subsequent orders are issued, or if Reilly and the plaintiffs are unable to agree on the terms of the August 1 order, the Court may be faced with the question whether to stay such order or orders pending resolution of the issues in this case.

SUMMARY

We have tried to give this Court a good overview of the status of this case, on all the matters recited in the pre-trial notice, so that the Court may instruct the parties or enter such orders as may seem proper to the Court to expedite pre-trial or trial. Our observations and suggestions have been as follows.

1. The parties have been discussing settlement extensively for over a year. Progress has been made, but that progress has not resolved the case nor prevented the expenditure of massive amounts of lawyer time, consultant time, and expense.

2. The CERCLA issues, including those which are remedy-oriented, could be brought to trial within six months if they were severed from the issues raised by the intervenors. Thereafter, the remaining issues are more likely to be settled, or could be scheduled for a later trial, or remanded to the state court. We estimate the length of trial to be eight weeks on the CERCLA claims; twenty-four weeks on the entire case.

3. If the case is not bifurcated between "CERCLA issues" and "Intervenor issues," we request the Court to establish a realistic discovery schedule and deadlines.

4. If the case is not bifurcated and discovery is to proceed on lawyer depositions, we ask the Court to appoint a special master as requested in our letter of June 15, 1984.

5. No action is requested of this Court at this time relating to the EPA's issuance of administrative orders with respect to the remedy. However, we have advised the Court that administrative orders could further broaden the issues in this case.

Honorable Paul A. Magnuson
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We hope the foregoing has been of assistance to the Court in understanding the status of this matter. We also hope that our suggestions will be helpful to the Court in charting a course for a more expeditious handling of the case.

Very truly yours,

Edward J. Schwartzbauer

EJS:ml
Enclosures

cc: All Counsel of Record
Honorable Floyd E. Boline

bcc: Robert Polack, Esq.
Becky A. Comstock, Esq.
Michael J. Wahoske, Esq.
Renee Pritzker, Esq.
Mark R. Kaster, Esq.
Lee Keller